In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1253

LESTER PERRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 7a-10a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on February 3, 1976. The petition for a writ of certiorari was filed on March 4, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court erred in calling a participant in the crime as a court witness.

2. Whether the trial court abused its discretion in refusing to reopen the case to permit petitioner further cross-examination of a prosecution witness.

3. Whether the evidence was sufficient to support the conviction.

4. Whether the prosecutor misstated a witness's testimony in closing argument.

5. Whether various evidentiary rulings were erroneous.

6. Whether the district judge was required to recuse himself in response to a threat on his life.

RULES INVOLVED

Federal Rule of Evidence 607 provides:

> The credibility of a witness may be attacked by any party, including the party calling him.

Federal Rule of Evidence 614(a) provides:

> The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

STATEMENT

After a jury trial in the United States District Court for the Southern District of West Virginia, petitioner was convicted of the armed robbery of a mail truck driver, in violation of 18 U.S.C. 2114, 2. He was sentenced to 25 years' imprisonment. The court of appeals affirmed (Pet. App. 7a-10a).[1]

On February 3, 1969, a mail truck in West Virginia was robbed of $10,000 in cash by three men, one of whom carried a pistol. The government's case at trial was established primarily through the testimony of Ventrue Mitchell, a co-defendant who pleaded guilty to a conspiracy charge, and Douglas Willard, an unindicted co-conspirator.

---

[1]Donald Joseph Chambers was tried and convicted along with petitioner. Chambers' conviction was reversed by the court of appeals for lack of sufficient evidence.

BLEED THROUGH

The evidence showed that some three months before the robbery, Mitchell had discussed robbing the mail truck with petitioner, a postmaster (Tr. 312). Petitioner disclosed to Mitchell the route, timing schedule of the mail truck, and the location of the money in the truck. The two agreed upon how the purloined funds would be divided.

Mitchell then secured the services of Douglas Willard, who in turn solicited the assistance of two individuals named "Ed" and "Don."[2] Mitchell went with Willard to petitioner's house and discussed the robbery while Willard waited in the car. Mitchell also talked about the robbery with petitioner on the day before it was to occur (Tr. 312-318). Willard, "Ed," and "Don" committed the actual robbery; they gave Mitchell $3,900 and petitioner $1,600 from the proceeds.

Before Willard testified the prosecutor, outside the presence of the jury, requested the court to call Willard as a court witness. The prosecutor told the court that he did not want to vouch for Willard's testimony. Defense counsel agreed, on condition that the jury be advised of this fact (Pet. App. 9a). The court called Willard and told the jury that Willard was so treated because the government did not want to "vouch for his credibility." Defense counsel then changed his mind and objected, arguing that it was improper for the government to put a witness on the stand without vouching for his credibility. This objection was overruled (Tr. 110-111).

Willard testified that he, "Ed" and "Don" committed the robbery. Willard corroborated the testimony of Mitchell that the latter had suggested the mail truck

---

[2]The government contended at trial that "Ed" and "Don" were co-defendants Edward Smalley and Donald Chambers.

robbery to him and that the two men had gone to petitioner's house shortly before the robbery. Willard said that Mitchell had told him that petitioner, an inside source, would facilitate the robbery (Tr. 126-132). Willard also testified that after the robbery petitioner had demanded the balance of his share of the proceeds from him (Tr. 193).

ARGUMENT

1. Petitioner challenges (Pet. 9-10) the trial court's decision to call Willard as a court witness. The court's decision was proper. A party no longer vouches for its witnesses, and the court is free to call such witnesses as it thinks appropriate. See Fed. R. Evid. 607 and 614(a).[3]

2. Petitioner argues (Pet. 10-11) that the trial court should have allowed him to reopen his case after both sides had rested.

During the trial petitioner raised the claim that Willard's testimony against him had been recently fabricated. The motive for this, petitioner alleged, was that after the robbery petitioner had implicated Willard in a local murder scheme. The government therefore recalled Barbara Cagle, who testified that in 1969, before petitioner had implicated Willard, Willard had driven her through the area where the robbery occurred and told her that petitioner had assisted in the robbery. See Fed. R. Evid. 801(d)(1)(B). Petitioner's

---

[3]During Willard's testimony, the prosecutor read to him excerpts of a statement he had made to a local police officer concerning the robbery. This statement varied in slight detail from his trial testimony. Petitioner claims (Pet. 10) that this was error. But the statement was not introduced into evidence. In any event it did not constitute impeachment, for Willard, on hearing the statement, agreed that it was accurate (Tr. 179-181). This procedure was proper. See Fed. R. Evid. 612 and 613.

counsel then cross-examined her and all sides rested (Tr. 562-570). Cagle was excused and returned to her home in Cleveland.

Two days later, when the court reconvened for closing arguments, petitioner asked permission to reopen his case and to impeach Cagle with grand jury testimony in which, while describing the drive with Willard, she had not mentioned petitioner.[4] The court, noting that Cagle had been excused with petitioner's acquiesence (Tr. 570) and that the grand jury testimony had been made available to him at the conclusion of her original direct examination (Tr. 576), denied this motion.

This decision was not error. Petitioner's counsel had possessed Cagle's grand jury testimony well before she testified on redirect. There was no reason why counsel could not have asked her before resting the questions he later proposed to ask. The trial judge possesses broad powers to deal with "the complexities and contingencies inherent in the adversary process," and he has considerable discretion to control the scope of rebuttal testimony and examination of witnesses. *Geders* v. *United States,* No. 74-5968, decided March 30, 1976, slip op. 6. See also Fed. R. Evid. 611(a). The district court did not abuse its discretion here.

3. There is no substance to petitioner's contention (Pet. 11-12) that the evidence was insufficient to sustain his conviction. It rests on the erroneous premise that a conviction may not be based entirely on the testimony of accomplices, a premise that this Court has rejected. See *Caminetti* v. *United States,* 242 U.S. 470.

---

[4]Cagle testified before the grand jury that Willard had told her that "a guy from inside of the post office * * * let the boys know when there would be a haul" (Tr. 575). She did not name petitioner as the source of the information.

4. Petitioner argues (Pet. 13) that the prosecutor misstated the evidence in arguing to the jury that Willard had identified petitioner.

When Willard identified petitioner he was somewhat hesitant; he initially said that he did not see his confederate in the courtroom but then stated that petitioner "looks familiar" (Tr. 128). This testimony was not erroneously characterized by the prosecutor. While the prosecutor initially said that Willard had identified petitioner, he qualified his statement after petitioner's counsel objected. In fact, the prosecutor expressly conceded that Willard had not pointed to petitioner and identified him (Tr. 591).

5. Petitioner argues (Pet. 13-14) that the trial court erroneously admitted evidence of his involvement in cockfighting activities and adultery, and permitted a witness to give an opinion as to his guilt.

Petitioner testified at trial. He proffered, as an alibi, testimony that he had been in Texas during the robbery attending a school on gamecocks (Tr. 500, 508). This opened up an examination of his involvement in cockfighting. The adultery matter also was initiated by petitioner's counsel. During cross-examination of Willard, petitioner's counsel read from a statement Willard had given the police concerning a burglary in which Willard, Mitchell and petitioner had participated (Tr. 236-238). The full statement was not read, however, and the prosecutor inquired as to the remainder of it. The statement described a proposed plan to facilitate the burglary by luring the woman of the house outside, because she and petitioner were "having a relation" (Tr. 279). It is proper to have all of a partially admitted statement on a particular subject admitted. See Fed. R. Evid. 106.

BLEED THROUGH

The "opinion" evidence of which petitioner complains consists of evidence elicited by the prosecutor on cross-examination of a witness called by petitioner. The witness, a postal inspector, testified on direct examination that petitioner had cooperated in 1967 by informing the authorities that he had been approached by individuals seeking to rob a mail truck (Tr. 394-400). This robbery was never consummated. The prosecutor brought out on cross-examination that petitioner had told the would-be robbers that the truck would be guarded and that the time might not be opportune for a robbery (Tr. 402). This explicated the witness's initial testimony and did not constitute an opinion as to guilt.

6. Finally, contrary to petitioner's contention (Pet. 12-13), a judge need not disqualify himself from sentencing if he receives a threat. Petitioner has not alleged that the threat precluded the judge from exercising his independent and unbiased judgment, nor is there any objective indication in the judge's words or deeds that the threat affected his actions. What is more, the mandatory sentence for petitioner's crime was 25 years' imprisonment, which he received.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

SIDNEY M. GLAZER,
ROBERT H. PLAXICO,
Attorneys.

MAY 1976.

DOJ-1976-05